AM Property Holding Corp., Maiden 80/90 NY LLC, and Media Technology Centers, LLC, a single employer, a joint employer with Planned Building Services, Inc. *and* Local 32BJ, Service Employees International Union *and* United Workers of America (Party In Interest).

AM Property Holding Corp., Maiden 80/90 NY LLC, and Mediate Technology Centers, LLC, a single employer, a joint employer with Servco Industries, Inc. *and* Local 32BJ, Service Employees International Union. Cases 02–CA–033146–1, 02–CA–033308–1, 02–CA–033558–1, 02–CA–033864–1, and 02–CA–034018–1

December 15, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

This case, on remand from the United States Court of Appeals for the Second Circuit,[1] requires us to determine whether Respondent Planned Building Services (PBS) was an individual successor employer, and therefore violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Charging Party Union. The court directed the Board, before addressing that question, to decide whether, consistent with due process, the Board can make that determination on the present record, or whether it is necessary to remand the case to the administrative law judge to provide PBS with an opportunity to litigate the issue.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the remanded issues. As explained below, we find that the issue of individual successorship was closely connected to the subject matter of the complaint and that it was fully and fairly litigated before the administrative law judge. We further find, consistent with due process, that PBS individually was a successor, that the unit of PBS employees at 80-90 Maiden Lane remained an appropriate unit, and that PBS violated Section 8(a)(5) and (1) by failing to recognize and bargain with the Union.

I.

We assume the reader's familiarity with the Board's underlying decision and order in this case,[2] as well as the Second Circuit's decision. Our review of the factual and procedural background, then, will be brief.

A.

This case centers on a Manhattan office building, 80-90 Maiden Lane, and the cleaning services workers employed there. The Board found that Respondent AM Property Holding Corp. (AM) acquired the building on April 25, 2000,[3] and unlawfully decided to avoid hiring or using the employees of the incumbent cleaning employer. That employer, Clean-Right, an in-house cleaning service owned by the building's previous owner, the Witkoff Group, was party to a single-facility-unit collective-bargaining agreement with the Union, covering the building's cleaning staff.

The same day that it acquired the building, AM contracted with PBS to replace Clean-Right. PBS hired (and transferred from its other local worksites) 11 employees to begin work at the building that evening, plus a day matron. PBS thereby displaced—for unlawful reasons—11 Clean-Right employees who worked nights, plus the Clean-Right matron who worked days.[4] AM transferred three of its own employees (an elevator operator and two porters) from its other properties to be day employees at the building, also displacing Clean-Right employees who had been members of the Union's bargaining unit from those positions.[5]

PBS refused to recognize and bargain with the Union as the representative for its new unit. In addition, PBS made unilateral changes to employees' pay and other

[1] *Service Employees International Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011).

[2] 350 NLRB 998 (2007).

[3] All dates are in 2000 unless otherwise indicated.

[4] PBS's discriminatory refusal to hire the former Clean-Right employees or to consider them for hire violated Sec. 8(a)(3) and (1). 350 NLRB at 1004, enfd. in relevant part 647 F.3d at 450. It follows that but for PBS's unlawful conduct, the former Clean-Right employees would have constituted the majority of PBS's employees at 80-90 Maiden Lane, and the Union's status as the exclusive collective-bargaining representative of those employees would have survived PBS's takeover as provider of cleaning services at that location. See *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979). As more fully explained below, the PBS employees at 80-90 Maiden Lane remained an appropriate unit, and there was substantial continuity between Clean Right's operation and that of PBS. Accordingly, PBS, as a statutory successor, was obligated to recognize and bargain with the Union over the employees' terms and conditions of employment. Id. Its failure to do so forms the basis for our finding that PBS violated Sec. 8(a)(5) by unilaterally changing those employees' terms and conditions of employment provided in the collective-bargaining agreement without prior notice to or consultation with the Union, and for our Order that PBS make whole the unit employees it hired to replace the former Clean-Right employees and any other unit employees PBS hired later during the remedial period. Id.

[5] 350 NLRB at 1004, 1034–1037.

terms of employment.[6]

In relevant part, the General Counsel's complaint alleged that AM and PBS, as joint employers and joint successors, refused to hire the Clean-Right employees in violation of Section 8(a)(3), and refused to recognize the Union as their representative and unilaterally changed the unit's terms of employment in violation of Section 8(a)(5). The complaint did not allege in the alternative that either PBS or AM was individually a successor or that either entity individually violated Section 8(a)(5). The judge found that the General Counsel established joint employment and joint successorship, along with the violations alleged.[7]

B.

On exceptions, the Board found that PBS and AM had each violated Section 8(a)(3) in their respective hiring decisions, but that they were not joint employers or joint successors and therefore had not violated Section 8(a)(5) in that respect. 350 NLRB at 1002–1003. The Board found that it was precluded from considering whether PBS or AM had individually violated Section 8(a)(5) as a successor for a surviving bargaining unit, because the General Counsel had not alleged or litigated that theory and had not alleged or shown that either of the units encompassing workers employed by PBS and AM Property, respectively, was appropriate. Id. at 1003.[8]

The General Counsel applied to the Second Circuit for enforcement of the Board's Order. The Union filed a petition for review with respect to successorship, challenging the Board's finding that it could not consider PBS's status as an individual successor.

C.

On August 1, 2011, the court issued a decision enforcing the Board's Order as to the violations it had found. 647 F.3d at 450. The court agreed with the Board that there was no joint employer or joint successor liability. Id. at 446. The court, however, remanded the case for the Board to reconsider whether it could determine, consist*en*t with due process, whether PBS was a single successor for its unit of employees and, if so, whether PBS was in fact a single successor with an obligation to recognize the Union. Id. at 449.

Citing *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), the court noted that "the Board *may* identify a violation of the Act that was not specifically alleged in the complaint or advanced by the General Counsel *if* the parties had sufficient notice to satisfy due process—i.e., 'if the issue [was] closely connected to the subject matter of the complaint and has been fully litigated.'" 647 F.3d at 447 (emphasis in original; quoting *Pergament*, supra). The Board had erred, the court found, by assuming that it was "necessarily" barred from addressing single successorship for the sole reason that the General Counsel had not pursued that issue. Id. at 447–448. The Board should instead have determined, based on the facts in the record, whether the issue of PBS's status as a single successor "had been fully litigated and was sufficiently related to the underlying complaint such that finding a violation on that ground would comport with due process." Id. at 448.

If the Board answered those questions in the affirmative, the court continued, the Board should apply its successorship criteria to PBS, including whether the surviving PBS unit was appropriate. Id. With respect to the unit's appropriateness, the court noted the Board's well-established policy that a unit limited to a single facility is presumptively appropriate. The court therefore found it "immaterial" that the General Counsel had not alleged or affirmatively shown that the PBS employees at the 80-90 Maiden Lane facility constituted an appropriate unit. Id. at 449. The court instructed the Board to apply its single-facility presumption to the question of whether PBS was an individual successor to Clean-Right, or to state its reasons for not doing so. Id. The court further instructed the Board, if it found that due process precluded it from making such findings, to determine whether a remand to the judge for further fact-finding is appropriate. Id.

On May 30, 2012, the Board accepted the court's remand, and the parties thereafter filed position statements addressing the remanded issues.

III.

Applying the Second Circuit's ruling as the law of the case, we conclude, for the reasons that follow, that (1) consistent with due process, we may determine (on the present record, without a remand) whether PBS individually was a successor employer; and (2) under established

[6] Id. at 999, 1019–1024. PBS also unlawfully assisted another union, the Respondent United Workers of America (UWA), to obtain authorization cards from a majority of the unit, and it subsequently recognized that union as representative of a multi-site bargaining unit. Id. at 1005-06.

[7] The judge and the Board also found that PBS, AM, and a third Respondent, Servco Industries, committed other subsequent violations, which are no longer at issue.

[8] On March 27, 2008, a two-Member Board found that the Union failed to show extraordinary circumstances justifying reconsideration of the Board's refusal to consider whether PBS was a sole successor. 352 NLRB 279 (2008). The two-Member Board found it significant that the General Counsel did not join the Union's motion, and it inferred from this that the General Counsel "did not, and does not, intend to litigate the case on this basis." Id. at 281 fn. 8. (The two-Member Board granted the General Counsel's separate motion for reconsideration, finding that PBS had also violated Sec. 8(a)(2) by recognizing the UWA. Id. at 280–281.) On August 27, 2010, that decision was adopted by a three-member panel of the Board. 355 NLRB 721 (2010).

legal principles, PBS was indeed a successor with a duty to bargain with the Union.

A.

Under Pergament, supra, the Board "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." 296 NLRB at 334 (internal citations omitted).

1.

The issue of single successorship is not only "closely related" to the complaint allegation of joint successorship; it is in all practical terms identical. PBS does not argue to the contrary.

The established criteria for finding successorship look to whether the new employer's operation and practices differ significantly from its predecessor's, and whether the surviving unit of employees remains appropriate within the meaning of Section 9 of the Act. *NLRB v. Burns Int'l. Security Services. Inc.,* 406 U.S. 272, 280 (1972); *The Bronx Health Plan,* 326 NLRB 810, 811-812 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999). In determining whether the new operation differs significantly, the Board examines whether the new entity "has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations"; and whether there is "substantial continuity" between the enterprises. *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 43 (1987), quoting *Golden State Bottling Co v. NLRB*, 414 U.S. 168, 184 (1973). For this purpose, the Board looks to whether "the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River Dyeing,* supra, 482 U.S. at 43.[9]

The "substantial continuity" analysis is made "primarily from the perspective of the employees," i.e., "whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'"[10] Accordingly, "a change in scale of operation must be extreme before it will alter a finding of successorship."[11]

Thus, where joint successorship is alleged, the Board need not perform a separate analysis of the particular business operations of each alleged successor, or of the role each plays in managing the new operation (as, by contrast, when determining whether there are joint employers). The focus instead is on the surviving employing unit alone, and the extent to which, from the employees' perspective, the unit differs from the predecessor unit. In the case of either a single or joint successorship, the only relevant evidence extrinsic to the new operation would relate to *other* worksites that might affect the bargaining unit's appropriateness. Where a joint successorship is alleged, evidence of the relationship between the two employers would be relevant only for the purpose of determining whether the successorship found comprises one or both employers.[12] Such evidence would be entirely separate from the evidence of whether a successorship occurred. Our dissenting colleague, in asserting that due process for PBS requires a remand in this case, ignores this altogether.

2.

We also find that the single successorship issue was fully litigated. Under *Pergament*, "the determination of whether a matter has been fully litigated rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." 296 NLRB at 335. Although not acknowledged by our dissenting colleague, PBS makes no such claim here. Except in one instance, it does not argue that it

[9] The Board considered the same factors in Mason City Dressed Beef, the only published case in which joint successorship was alleged and found by the Board. 231 NLRB 735, 745 (1977), enfd. as modified 590 F.2d 688 (8th Cir. 1978). There, the Board adopted the judge's analysis, in which he first applied the above criteria to find that there was a successorship, 231 NLRB at 745; and then reviewed the relationship between the two employers and their respective roles concerning the new entity to find them joint successors. Id. at 745–747. (On review, the Eighth Circuit agreed with the Board that an agency relationship between the two employers established their joint liability, and it therefore did not reach the issue of joint successorship. 590 F.2d at 698.)

[10] *Tree-Free Fiber*, 328 NLRB 389, 389 (1999), quoting Fall River Dyeing, supra, 482 U.S. at 43, and Golden State Bottling, 414 U.S. at 184.

[11] *The Bronx Health Plan*, 326 NLRB at 812, quoting *Mondovi Foods Corp.*, 235 NLRB 1080, 1082 (1978).

[12] In some situations the precise scope of a successor unit could be affected by whether there are joint or single successor employers. Here, for example, AM rather than PBS filled three of the positions that existed in the predecessor unit: an elevator operator and two day porters. The new PBS unit, therefore, did not include those positions. If, on the other hand, PBS and AM had been joint successors, the combined successor unit would have included those employees. PBS, however, has not argued that this circumstance affected either the substantial continuity of operations or the appropriateness of the unit it acquired. Further, it is well established that a reduction in size of an appropriate unit does not make the surviving unit inappropriate. See, e.g., *Dean Transportation,* 350 NLRB 48, 48 fn. 2(2007), enfd. 551 F.3d 1055 (D.C. Cir. 2009); *The Bronx Health Plan*, 326 NLRB at 812.

would have introduced different or additional evidence, or conducted its case differently at the hearing, had the complaint alleged that PBS was the single successor to Clean-Right.[13]

PBS does contend that we should remand the case to take certain evidence, mostly unspecified, concerning its operations and the appropriateness of the bargaining unit that it asserts precludes the finding of a single successorship. It does not, however, explain persuasively why it failed to produce such evidence at the hearing, notwithstanding that successorship has always been one of the central issues in this case. The parties made an extensive record at the hearing concerning PBS's operations at 80-90 Maiden Lane, any differences between those operations and those of Clean-Right, and the appropriateness of the bargaining unit. Whatever evidence PBS now wishes to introduce concerning single successorship, if relevant at all, would have been equally relevant to the question of joint successorship at the time of the hearing. PBS's failure to introduce such evidence at that time, or to explain persuasively why the absence of a complaint allegation of single successorship prevented it from doing so, negates any suggestion that a refusal to hear that evidence now would deny PBS due process. In any event, as we explain below, the purported evidence is either irrelevant or would not require a different result even if adduced and credited.

For all of the foregoing reasons, we find that due process considerations do not bar us from deciding the issue of PBS's single successorship on the present record, and that we can and should address that issue.

B.

Based on the record, we conclude that PBS, individually, was a successor to Clean-Right. The Board's underlying decision accepted the judge's factual findings relevant to the issue of successorship,[14] and PBS did not challenge any of them.[15] Those findings are therefore final,[16] and they amply support our successorship determination. The record demonstrates (1) that there was substantial continuity between Clean Right's operation and that of PBS, notwithstanding PBS's assertion that it supervised the operation differently; and (2) that the bargaining unit remained appropriate.

1.

Substantial continuity of operations is readily apparent from the factual findings of the judge. In turn, we are not persuaded by the assertions of PBS that a remand is required for additional fact-finding and to permit it to introduce additional evidence on this point.

PBS took over night cleaning of the building the same day that it submitted its bid to AM. 350 NLRB at 1018-1019. It did so without viewing the property or developing any distinct plan for a cleaning operation tailored to this particular building.[17] In addition, in all of PBS's hiring interviews with the Clean-Right discriminatees who applied to retain their jobs, there was no discussion of specialized skills with any type of equipment. Id. at 1022–1023. Consistent with this, in defending against the refusal-to-hire allegations, PBS asserted (in the judge's paraphrase) that although the discriminatees "had great experience in the building . . . they could be replaced by workers who could learn the job very quickly." Id. at 1035.

All of these findings support the conclusion that the PBS office cleaning operation was very similar to Clean-Right's preceding operation. As the judge summarized: "Clean-Right employees were replaced by AM and PBS employees performing essentially the same work in the same building in the same manner with no hiatus in operations." Id. at 1040. And again: "AM and PBS employees immediately began cleaning the building upon the departure of the Clean-Right employees. They worked in the same building using similar equipment with no hiatus in their work."[18] Id. at 1041.

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[13] In that one instance, PBS's contention is without merit, as we explain below, because the evidence is not material and does not withstand careful scrutiny in any case.

[14] As noted above, the Board's determination that PBS and AM were not joint successors was based solely on the rejection of the General Counsel's legal contentions pertaining to joint employer status. 350 NLRB at 1003.

[15] PBS did except to the judge's finding, as part of his determination that PBS's refusal to hire the discriminatees violated Sec. 8(a)(3), that the Clean-Right employees were qualified for the new operation and were bona fide applicants. Evidence supporting this exception might also have been arguably relevant in determining whether PBS was a successor in the context of Sec. 8(a)(5)—i.e., whether the work performed at the new operation differed significantly from the work performed at the former operation. However, PBS's supporting brief to the Board cited no evidence contrary to the judge's finding and did not address work qualifications at all. In fact, the record supports the judge's finding, which the Board adopted by affirming the 8(a)(3) violations. Accordingly, the judge was also correct in finding that neither the unit jobs nor the employees' related work qualifications were changed by PBS.

[16] See Sec. 102.46(b)(2) and (g) of the Board's Rules and Regulations.

[17] During the negotiations between PBS and AM over their service contract—which were completed in 2 days or less—the principals discussed "the square footage of the building, the number of tenants, the occupancy of the building, the number of restrooms and floors and whether the lobby was marble, stone or granite." PBS did not conduct a walk-through of the building, but used a "formula" to "calculate the number of employees needed." PBS also consulted a real estate reference book containing the "physical specifications of buildings in Manhattan."

[18] To support its contention that the work performed had significantly changed, PBS cites an incident on July 12, 2000, 6 weeks after PBS

PBS nonetheless asserts that a remand for additional fact finding is necessary, and that it can provide additional evidence to show that its cleaning operation at 80-90 Maiden Lane differed significantly from the Clean-Right operation. PBS contends that while Clean-Right "exists exclusively [and] operates solely as a means by which Witkoff [its corporate owner] can maximize returns on its various real estate investments," PBS "is in the business of providing cleaning and janitorial services to the open market." PBS further implies that the far-flung scope of Clean-Right's operations— "beyond New York into New Jersey, Philadelphia, Chicago, Detroit, Hawaii, and Dallas"—requires Clean-Right to maintain "its own management structure at each location," while PBS's more concentrated operations at "many dozens of locations throughout New York City and in parts of neighboring New Jersey and Connecticut" allow it to maintain a "headquarters-based approach."

We reject this argument for several reasons. First, in order to justify a remand, PBS cannot rest on the simple assertion that material evidence not already in the record is available; it must identify such evidence.[19] It has not done so.[20] Second, as noted above, the test for a single successorship is entirely subsumed within the test for a joint successorship. PBS was therefore required to present at the hearing all the additional evidence it belatedly claims to be relevant to its defense. Nor does PBS claim that it was precluded from introducing any such evidence by the absence of a single successorship allegation in the complaint. Finally, even assuming there were evidence confirming that PBS's corporate purposes are different from Clean-Right's, such evidence would be immaterial here, because it has no bearing on whether, from the perspective of the employees, they would reasonably view their jobs as essentially unaltered. As we have found, the Clean-Right and PBS employees performed "essentially the same work in the same building in the same manner . . . using similar equipment."

Nor are we persuaded that an asserted difference in supervision between Clean-Right and PBS is significant here, either factually or legally. PBS argues that Clean-Right maintained "site-specific" supervision at the building, whereas PBS centralizes the supervision of its worksites offsite and assigns no on-site supervisors. According to PBS, additional evidence would confirm that "[a]lthough, at first glance, it might appear as though PBS and Clean-Right perform similar work—cleaning office buildings—the method in which the work was supervised and ultimately performed is readily distinguished." Even assuming that PBS's supervision was to some degree more centralized than Clean-Right's, this distinction does not prevent a finding of continuity of operations. As explained above, there is no indication in the record of any discontinuity in the unit employees' jobs or their working conditions, work processes, product (office cleaning), or customer (the same building).[21]

But in any case, the supposed distinction does not withstand careful scrutiny. The record reveals that, in fact, Clean-Right and PBS handled supervision at the building in a similar way. Clean-Right had an employee apparently designated a "foreman," but PBS does not assert that Clean-Right's "foreman" was a statutory supervisor under Section 2(11) of the Act. In turn, PBS hired Dennis Henry, who had been employed by AM at 75 Maiden Lane, the building across the street,[22] to work at 80–90 Maiden Lane at the outset of the changeover as a quasi-supervisory employee.[23] The judge found that Henry, in his new position, distributed keys and supplies to the cleaners at the start of the night shift and collected them at the end, "ensur[ed] that the work was done properly," inspected cleaned areas, and directed that

took over the building's cleaning operation, in which former Clean-Right employee Zoila Gonzalez declined to accept hire by PBS because she would have been required to perform "heavier" cleaning work (with a mop) than before. At the Clean-Right operation, such work had been performed by male porters and Gonzalez, for health reasons, had not been required to use a mop. However, PBS's policy that "all the women employees mopped," 350 NLRB at 1023-1024, did not establish a change in the work of the unit; it indicated only that one particular task was assigned to a different unit employee.

[19] See *Grinnell Fire Protection Systems*, 307 NLRB 1452, 1452 fn. 2 (1992); NLRB Rules and Regulations Sec. 102.48(d)(1) (motions to reopen the record).

[20] Nor has PBS cited any specific evidence from the current record to support its asserted differences from Clean-Right. While this is consistent with PBS's assertion that a remand is necessary, the test for sole successorship, as shown above, is essentially subsumed in the test for joint successorship. PBS has also already contested its liability as a successor "under any other [than joint successor] legal theory." It is therefore indicative that PBS can offer no relevant evidence from the lengthy record already compiled to negate its having been a single successor of Clean-Right.

[21] It is unclear whether PBS contends that the record should be reopened to receive further evidence on the supervision issue ("Although the record developed before the ALJ is not conclusive . . ."), but if it does, we reject the contention. PBS has identified no evidence outside the record that would confirm any specific discontinuities in supervision, nor does it assert that the absence of a single successorship allegation in the complaint prevented it from introducing any such evidence at the hearing.

[22] Under a separate service contract, PBS already provided cleaning services for AM at 75 Maiden Lane at the time it took over the cleaning operation at 80-90 Maiden Lane. The cleaning employees at 75 Maiden Lane were unrepresented.

[23] In fact, AM urged PBS to "consider Henry for a supervisory role for the building" before PBS took over the building's cleaning operation. 350 NLRB at 1021. The PBS-AM service contract for 80-90 Maiden Lane also specified that "at your [AM's] request, the monthly rate incorporates the retention of one night supervisor." Id. at 1019.

work be redone where necessary.[24] Although the judge concluded that Henry did not responsibly direct employees or assign work beyond "routine implementation of assignments already known by the employees," and that he was therefore not a statutory supervisor for PBS,[25] he also found that Henry was an agent of PBS, observing that "AM [and] PBS . . . all referred to Henry as their supervisor, and [PBS's regional supervisor] told [one] employee that Henry was her supervisor . . . . The employees also referred to him as their supervisor. They took orders from him, received assignments from him, had their work checked by him, submitted requests for leave to him, and he initialed their time cards and gave them their paychecks."[26] For these reasons, employees would reasonably view their on-site supervision as essentially unaltered.

2.

The remaining issue is whether a unit of PBS employees at 80-90 Maiden Lane is an appropriate bargaining unit. PBS contends that the record evidence indicates that only a multi-location unit is appropriate. It simultaneously contends that it would be impossible to analyze whether a single-location unit is appropriate given what it terms the "paucity" of information in the record concerning this issue. We reject both contentions.

As the court noted, a preexisting bargaining unit remains presumptively appropriate after a change in the employing enterprise, and the alleged successor employer has the burden of rebutting this presumption. *Van Lear Equipment,* 336 NLRB 1059 (2001). The presumption is "particularly strong where . . . the employees have historically been represented in a single-location unit," as was the case here. Id., citing *Montauk Bus Co.,* 324 NLRB 1128, 1135 (1997). Moreover, the evidentiary burden on the party challenging a historical unit "is a heavy one."[27]

To rebut the presumption, PBS must show that the functional integration between 80-90 Maiden Lane and its other operations is "so substantial as to negate the separate identity of the single-facility unit."[28] To do so, PBS would be required to show that the unit has been so integrated with its other operations that it no longer has a separate identity, on the basis of "such factors as central control over daily operations and labor relations, including extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; and bargaining history, if any."[29]

For the reasons explained above, PBS was effectively required to make that showing at the hearing with respect to either a joint or a single successorship. But it made no such showing. In fact, when asked by the judge at the outset of the hearing whether PBS was contending for a two-building unit, its counsel stated that "we don't really think it makes a difference—single or double."[30] Pergament applies "with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses," 296 NLRB at 334, or, as in this case, of the Respondent's own counsel. In short, the appropriateness of the single-unit presumption was well established when PBS litigated the underlying case, but PBS effectively waived the issue at trial.

Nevertheless, PBS now asserts that "only a multi-unit location is appropriate in this instance."[31] We find no merit to this assertion, which is based (except in one instance) only on conclusory statements without record support.[32] Moreover, as the Union notes, PBS has already admitted in a previous case that single units were appropriate at three of its other New York sites, and the Board so found.[33] That PBS does not claim that its operation at 80–90 Maiden Lane differed from PBS's other operations in New York undermines any argument it could make that a single-facility unit here is inappropriate.

[24] Id. at 1032.

[25] Id. at 1032-1033.

[26] Id. at 1033-1034.

[27] *Trident Seafoods***,** 318 NLRB 738, 738 (1995)**,** enfd. in relevant part 101 F.3d 111 (D.C. Cir. 1996).

[28] *Orkin Exterminating Co*., 258 NLRB 773, 773 (1981). See also *Van Lear Equipment*, 336 NLRB at 1063; *Montauk Bus Co.,* 324 NLRB at 1135; *Penn Color, Inc.,* 249 NLRB 1117, 1119 (1980).

[29] *D&L Transportation,* 324 NLRB 160, 160 (1997).

[30] Our dissenting colleague dismisses this admission and its significance by asserting that "PBS could have reasonably chosen a litigation strategy aimed at defeating the General Counsel's case on the threshold joint-employer issue." But PBS's litigation strategy does not alter the fact that, even under the General Counsel's original theory of the case, the unit issue was present from the beginning and PBS had every opportunity and incentive to demonstrate that the unit was inappropriate under the employee-based criteria reviewed above.

[31] PBS initially contended in its answer to the complaint that the appropriate unit would encompass two sites, including the adjoining building, 75 Maiden Lane. In its post-remand position statement to the Board, however, PBS implies that the unit could include all of its "New York City-area buildings." In between, as noted above, PBS stated to the judge at the hearing that "we don't really think it makes a difference – single or double." PBS's inconsistency on this issue further diminishes the force of its argument.

[32] According to our dissenting colleague, "PBS is not resting on the bald assertion that other evidence is available" with respect to the unit appropriateness issue, but "[r]ather . . . has pointed to the need to develop facts relevant to a defense it did not know it had to present." But, again, the unit issue was present in the case from the beginning.

[33] See *Planned Building Services*, 347 NLRB 670, 678, 717 (2006) (PBS III). PBS asserts that this is a "red herring" on the ground that the collective-bargaining agreements for those units are "nearly verbatim duplications of each other." Similarity between the contracts, however, is irrelevant to whether the PBS single-location units are appropriate.

PBS claims that its employees at 80-90 Maiden Lane engaged in "rapid and frequent interchange" with its employees at other locations. In support, PBS cites evidence that more than 50 employees worked intermittently at 80-90 Maiden Lane, although the location typically needed only 12 employees at a time. PBS urges that this factor supports a finding that a single-facility unit is inappropriate.

PBS's argument is wide of the mark because it equates the undisputed *turnover* of employment and the permanent transfer of employees between its worksites with actual, day-to-day employee *interchange* on the job**.** The record does show that some PBS employees transfer from one worksite to another, either of their own volition or at management's request.[34] But it is well established that permanent transfers are a less significant indication of actual interchange than temporary transfers. See, e.g., *Deaconess Medical Center,* 314 NLRB 677, 677 fn. 1 (1994); *Red Lobster*, 300 NLRB 908, 911 (1990). More importantly, the existence of such permanent transfers does not alter the fact that PBS employees go to work at the same building on a day-to-day basis until they choose to quit, are discharged, or transfer to another site. And the record does not establish day-to-day interchange between PBS employees at 80-90 Maiden Lane and at other locations; indeed, it supports the opposite conclusion. PBS employees at 80-90 Maiden Lane testified without contradiction that they were rarely if ever assigned to work at 75 Maiden Lane, the building across the street also cleaned by PBS. Henry, whom the judge found to be PBS's agent, confirmed that employees at 80-90 Maiden Lane were only assigned to work at 75 Maiden Lane "once in a blue moon." He also testified that the PBS employees at 75 Maiden Lane "never" worked at 80-90 Maiden Lane. In short, PBS has failed to show that the employees it hired at 80–90 Maiden Lane had interchange with employees at other PBS units in the regular course of their work.[35]

In sum, PBS has cited no record evidence that would rebut the presumption that the surviving single-location unit remains appropriate here. PBS contends, in the alternative, that the "paucity" of information concerning the appropriateness of a single-facility unit at 80-90 Maiden Lane requires a remand. Again, we disagree. PBS does not indicate what evidence it would introduce on remand, or why it would rebut the single-facility presumption. Nor does it explain why it did not introduce that evidence at the hearing. Its failure to do so is especially significant, since the appropriateness of the bargaining unit was a central issue in the case.

PBS does assert that because of the complaint's "specific allegations," it did not introduce certain evidence purportedly undercutting the significance of the single-location contracts at some of its other facilities. There is no merit to that assertion. That evidence, as we have stated, is irrelevant. And if it were relevant, it should have been offered at the hearing regardless of whether the complaint alleged single or joint successorship, because the appropriateness of a single-facility unit at 80-90 Maiden Lane was a key issue under either theory.

IV.

We therefore find that that PBS individually was a successor employer; that the surviving single-facility unit at 80-90 Maiden Lane remained appropriate for bargaining; and that PBS was accordingly required to recognize and bargain with the unit's bargaining representative at the time of the successorship.[36] PBS's refusal to do so consequently violated Section 8(a)(5). We turn now to the appropriate remedy.

In *Planned Building Services,* 347 NLRB 670 (2006)(*PBS III),* a similar case involving PBS, the Board confirmed that the appropriate remedy for a successor's unlawful refusal to hire the predecessor's represented employees and unilateral implementation of new terms of employment is as follows:

> [T]o remedy the 8(a)(3) violation, the successor must:
>
> (1) offer reinstatement to the discriminates; and
>
> (2) make the discriminatees whole for their losses.
>
> To remedy the 8(a)(5) violation, the successor must:
>
> (1) at the union's request, restore the terms and conditions of employment established by the predecessor, rescinding the unilateral changes made by the successor;
>
> (2) recognize and bargain with the union; and
>
> (3) make its employees whole for their losses.

347 NLRB at 674–675.

[34] For example, of the 11 employees who initially constituted the PBS unit at 80–90 Maiden Lane, 7 were new hires and 4 were transferred from other buildings. 350 NLRB at 1021.

[35] *P.S. Elliott Services*, 300 NLRB 1161 (1990), cited by PBS, is not to the contrary. In P.S. Elliott, the Board found that employees were not hired to work at "a particular jobsite" but rather were hired "based on the overall needs of the company." 300 NLRB at 1162. Thus, unlike in this case, those employees were hired to move between worksites in the regular course of work.

[36] PBS also asserts for the first time that the Union made no timely bargaining demand. However, no demand was required because PBS's unlawful refusal to hire the Clean-Right employees made any such request futile. *Smith & Johnson Construction Co.,* 324 NLRB 970 (1997); *Precision Industries*, 320 NLRB 661, 711 (1996), enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998).

The Board's underlying decision in this case found that PBS had violated Section 8(a)(3) by discriminatorily refusing to hire certain Clean-Right employees and ordered the appropriate remedy for that violation, requiring PBS to hire those employees and to make them whole for loss of earnings and other benefits suffered. 350 NLRB at 1008, 1010. Accordingly, although the court enforced that part of the Board's order, the 8(a)(3) remedy provided make-whole relief only for the Clean-Right discriminatees whom PBS refused to hire. We must now provide a remedy for the Section 8(a)(5) violation we have found, in order to make whole the unit employees PBS hired to replace the discriminatees and any other unit employees PBS hired later during the remedial period.

Remedial backpay and benefits are "measured by the predecessor's terms and conditions of employment." *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2 (2014). Ordinarily, the backpay period extends from the date of the successor's unlawful refusal to bargain "until the parties bargain in good faith to agreement or impasse." Id. at 6, reversing *PBS III*, supra, in this respect. Here, however, AM terminated PBS's service contract for 80–90 Maiden Lane as of June 15, 2001, thereby eliminating any connection between PBS and the bargaining unit. That contract-termination date, accordingly, fixes the end of the Section 8(a)(5) make-whole period.

The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall order PBS to compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 2 allocating the backpay awards to the appropriate calendar year for each employee. PBS shall also remit any payments it owes to employee benefit funds in the manner set forth in *Merryweather Optical Co.,* 240 NLRB 1213 (1979), and reimburse employees for any expenses resulting from its failures to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

Because PBS no longer has a relationship to the bargaining unit, we see no basis under Section 8(a)(5) for ordering PBS to bargain with the Union or to take any other affirmative action with respect to unit employees beyond the make-whole remedy described here. Moreover, in its underlying decision, the Board found that a broad cease-and-desist order should be issued against PBS in light of its violations of Sections 8(a)(1), (2), and (3) and its demonstration, as in previous Board cases, of animus toward the Union.[37] That broad cease-and-desist order was enforced by the Second Circuit,[38] and we note that it remains in effect. For these reasons, we find it unnecessary to now issue another cease-and-desist order, narrow or broad.

By contrast, we do find it appropriate to issue an affirmative corporatewide order and to require corporatewide posting of the attached remedial notice.[39] The Board has previously found that a corporatewide order and remedial notice posting was justified in view of PBS's clear pattern and practice of unlawful conduct and the likelihood that PBS would commit unlawful actions at its other facilities against other employees.[40] The Board did the same in *PBS III*.[41] For the same reasons, we will issue a corporatewide order and notice posting for the violations found here. Further, because PBS no longer services the 80–90 Maiden Lane location, we shall order PBS to mail a copy of the remedial notice to all unit employees who were employed at 80–90 Maiden Lane during the period April 25, 2000. through June 15, 2001.

ORDER

Respondent Planned Building Services, Inc., New York, New York, Fairfield, New Jersey (PBS), its officers, agents, successors, and assigns, shall

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, in the manner set forth in the remedy section of this decision, all employees who were members of the bargaining unit formerly represented by Local 32BJ, Service Employees International Union, at 80–90 Maiden Lane, New York, New York, for any losses caused by the Respondent's failure to apply the terms and conditions of employment that existed prior to its commencing operations at 80–90 Maiden Lane.

(b) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is

[37] 350 NLRB at 1046. See also *PBS III*, supra; *Planned Building Services*, 330 NLRB 791 (2000) (PBS II); and *Planned Building Services*, 318 NLRB 1049 (1995) (PBS I).

[38] 647 F.3d at 450.

[39] The notice conforms to our decision in *Durham School Services*, 360 NLRB 694 (2014).

[40] 350 NLRB at 1009 (citing *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1330 (2006); *Miller Group*, 310 NLRB 1235, 1235 fn. 4 (1993), enfd. 30 F.3d 1487 (3d Cir. 1994)).

[41] *PBS III*, supra, 347 NLRB at 677.

fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for each employee.

(c) Within 14 days after service by the Region, post at all facilities it currently services and all of its offices that oversee those facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by PBS's authorized representative, shall be posted by PBS and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if PBS customarily communicates with its employees by such means. Notices shall be posted in English and Spanish. Reasonable steps shall be taken by PBS to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix" to all employees in the above unit who were employed at 80-90 Maiden Lane during the period April 25, 2000, through June 15, 2001. Notices shall be in English and Spanish. The notices shall be mailed to the last known address of each of the employees after being signed by the authorized representative of PBS.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that PBS has taken to comply.

Dated, Washington, D.C. December 15, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

This case is before us on remand from the United States Court of Appeals for the Second Circuit, which affirmed in part, vacated in part, and remanded in part the Board's decisions in *AM Property Holding Corp.*, 350 NLRB 998 (2007), and *AM Property Holding Corp.*, 355 NLRB 721 (2010) (incorporating by reference 352 NLRB 279 (2008)). See *Service Employees International Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011). In relevant part, the Court affirmed the Board's findings that Respondents Planned Building Services (PBS) and AM Property Holding Corp. (AM) were not, as the General Counsel had alleged in the complaint, joint employers and joint legal successors to unionized predecessor Clean-Right, and therefore PBS and AM did not have a joint obligation to bargain with Local 32BJ, Service Employees International Union (Union) as the representative of a unit of employees formerly employed by Clean-Right at an office building located at 80-90 Maiden Lane in Manhattan (80-90 Maiden Lane), which AM had recently acquired.

However, citing *Pergament United Sales*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), the Court disagreed with the Board's finding that the Board was precluded from deciding an issue that was not alleged in the complaint: whether PBS was *individually* a legal successor to Clean-Right.[1] The Court directed the Board to determine whether this unalleged "individual successor" issue may be decided on the existing record consistent with due process, and if not, whether a remand to the administrative law judge is warranted to provide PBS

[1] In *Pergament United Sales*, supra, the Board held that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." 296 NLRB at 334.

The elements of legal successorship were addressed by the Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972) (*Burns*), and *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (*Fall River Dyeing*). A legal successor is an employer that (i) acquires, and continues in substantially unchanged form, the business of a unionized predecessor, and (ii) hires as a majority of its workforce, or of a segment of its workforce constituting an appropriate bargaining unit, the predecessor's union-represented employees. Where these elements are present, the new employer is a legal successor to the unionized predecessor employer, and it must recognize and bargain with the unit employees' incumbent bargaining representative if and when that representative demands recognition or bargaining. However, even if the new employer is a successor obligated to recognize and bargain with the union, it is not required to adopt its predecessor's terms and conditions of employment but may unilaterally set its own initial employment terms. In addition, if, in an effort to defeat legal successorship, the new employer engages in antiunion discrimination to avoid hiring the predecessor's employees as a majority of its workforce, the Board will deem the new employer a legal successor as a matter of law. *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 81–82 (1979), enfd. in relevant part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). The Board will also deem such an employer to have forfeited the successor's right to set initial terms and conditions of employment unilaterally, and the new employer will be held to have violated Sec. 8(a)(5) of the Act if it sets initial employment terms that differ from the predecessor's. Id. at 82. I disagree with this aspect of *Love's Barbeque*. See fn. 3, infra.

an opportunity to litigate this issue.[2]

My colleagues find that due process does not require a remand of the "individual successor" issue to the judge for further litigation. They then conclude, based on their interpretation of the existing record, that PBS was individually Clean-Right's successor and violated Section 8(a)(5) of the Act by failing to recognize and bargain with the Union.

I respectfully disagree with my colleagues' threshold finding that due process permits the unalleged "individual successor" issue to be decided on the existing record. In my view, it cannot be said that the unalleged issue of PBS's individual successorship was fully litigated. Rather than attempting to decide this issue absent any allegation or argument that PBS was individually a legal successor to Clean-Right—and speculating, as my colleagues do, about what PBS *should* have done at the hearing or what the record evidence "effectively" shows—I believe we should follow the approach of the Board in *Enloe Medical Center*, supra, and remand the case to the judge.[3]

Background

The factual details of this matter are fully set forth in the Board's underlying decisions and summarized in the Court's decision. Thus, I will only briefly review the facts here to place the due process issue in context.

Prior to April 2000, an entity called the Witkoff Group owned 80-90 Maiden Lane. The Witkoff Group used its "in house" cleaning division, Clean-Right, to perform cleaning services at 80-90 Maiden Lane. The Witkoff Group was party to a collective-bargaining agreement between the Union and the Realty Advisory Board on Labor Relations, a multiemployer association of which the Witkoff Group was a member. This agreement applied to the Clean-Right employees at 80-90 Maiden Lane as a single-facility bargaining unit.

On April 25, 2000, AM closed on the purchase of 80-90 Maiden Lane from the Witkoff Group. Prior to the purchase, AM had determined that it would not hire the incumbent Clean-Right employees but would instead contract with PBS. Thus, on April 25, AM contracted with PBS to provide cleaning services for AM at 80-90 Maiden Lane. At the time of the sale, there were 12 Clean-Right employees employed at 80-90 Maiden Lane. The contract between AM and PBS provided for 1 full-time night supervisor, 4 full-time night porters/matrons, and 12 part-time night porters.

On April 25, Clean-Right employees were told that 80-90 Maiden Lane had been sold, that the new contractor was bringing in its own employees, and that there were no applications for them. That same date, PBS hired (or, in some instances, transferred from other worksites) 11 employees to begin working at 80-90 Maiden Lane that evening, plus a day matron.

On April 26, AM transferred three individuals from other properties to day-shift positions at 80-90 Maiden Lane Thus, beginning April 26, AM directly employed at 80-90 Maiden Lane an elevator operator and two day porters.[4] As a result of these transfers, AM did not hire former Clean-Right employees who had been employed at 80-90 Maiden Lane in the classifications of elevator operator and day porter.

In May, PBS recognized and entered into a collective-bargaining agreement with the United Workers of America (UWA) as the bargaining representative of its em-

[2] See *Enloe Medical Center*, 346 NLRB 854, 855–856 (2006) (remanding to the judge to provide the respondent an opportunity to litigate a potential violation of the Act on a theory not alleged in the complaint or advanced by the General Counsel).

[3] Because I would find that the issue of PBS's status as an individual successor to Clean-Right has not been fully litigated, I need not and do not reach whether the "individual successor" theory is closely connected to the unfair labor practice complaint. I would leave that threshold issue for the judge to address on remand. If he determines that the "individual successor" issue is closely connected to the complaint, he should then allow the parties to fully litigate the issue, reopening the record if PBS so requests.

In its initial underlying decision, the Board found, among other things, that AM and PBS violated Sec. 8(a)(3) and (1) by refusing to hire or to consider for hire Clean-Right's former employees. 350 NLRB at 1004. This unfair labor practice finding, which was not challenged on review, is no longer at issue. Citing *Love's Barbeque*, supra, 245 NLRB at 82, my colleagues find that as a result of its Sec. 8(a)(3) violations, PBS forfeited its right under *Burns*, supra, to set initial terms and conditions of employment that differed from Clean-Right's. I have expressed my disagreement with this aspect of *Love's Barbeque*. See *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 7 fn. 4 (2014) (Member Miscimarra, concurring in part and dissenting in part); *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 43–44 (2014) (Member Miscimarra, concurring in part and dissenting in part). See also *Pacific Custom Materials, Inc.*, 327 NLRB 75, 75–76 (1998) (Member Hurtgen, dissenting). In my view, this aspect of *Love's Barbeque* deviates from the Supreme Court's holding in *Burns* that a successor is not bound by its predecessor's contractual obligations but rather is free to set its own initial employment terms. Thus, I agree with former Member Hurtgen in *Pacific Custom Materials*, who stated: "The 8(a)(3) violations yield their own compensatory remedy of reinstatement and backpay. It is excessive and punitive to use those 8(a)(3) violations to take away the legitimate defense to an 8(a)(5) allegation concerning the setting of initial terms." 327 NLRB at 75–76 (Member Hurtgen, dissenting). Accordingly, I would overrule this aspect of *Love's Barbeque*. To the extent the Board continues to adhere to this aspect of *Love's Barbeque*, however, I would permit the employer to present evidence "that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals." *Planned Building Services*, 347 NLRB 670, 676 (2006).

[4] AM also directly employed the building engineers, who had worked at 80-90 Maiden Lane for many years.

ployees at 80-90 Maiden Lane. On February 15, 2001, the UWA disclaimed interest in representing PBS's employees. On April 23, 2001, almost all the PBS employees at 80-90 Maiden Lane went on strike. On May 15, 2001, AM informed PBS that it was terminating their contract. AM then contracted with another entity, Servco, to furnish cleaning services at 80–90 Maiden Lane.

Based on unfair labor practice charges filed by the Union, the General Counsel issued a complaint alleging that PBS (along with AM and Servco) had committed various violations of the Act. As it relates to the instant remand, the complaint alleged that AM and PBS were joint employers and joint successors, and that they jointly refused to recognize and bargain with the Union and unilaterally changed the unit employees' terms and conditions of employment in violation of Section 8(a)(5) of the Act.[5] The General Counsel did not allege or otherwise argue that either PBS or AM was individually a successor to Clean-Right.

The administrative law judge found, among other things, that PBS and AM were joint employers and joint successors. On exceptions, the Board reversed the judge's joint-employer finding. *AM Property Holding Corp*., 350 NLRB at 999–1002. Accordingly, the Board unanimously determined that AM and PBS were not joint successors to Clean-Right, they did not have a joint obligation to recognize and bargain with the Union, and they did not jointly violate Section 8(a)(5). Id. at 1003.[6]

The Board also found that it was precluded from considering whether either AM or PBS *individually* was a successor to Clean-Right because the General Counsel had not litigated a Section 8(a)(5) violation on a theory of individual successorship. Id. at 1003–1004. The Board explained that the General Counsel had litigated the refusal-to-bargain allegation solely on the theory that AM and PBS, as joint employers, unlawfully refused to hire the Clean-Right employees because of their support for the Union, and therefore AM and PBS were joint successors obligated to recognize and bargain with the Union. The Board also observed that because AM and PBS each took over only a portion of Clean-Right's business, a key question in determining whether either PBS or AM individually may have been a successor was whether the employees in that entity's portion of the business constituted a separate appropriate bargaining unit. The Board found that because the General Counsel had not alleged or established the appropriateness of either the separate PBS unit or the separate AM unit, this further demonstrated that the issue of whether AM or PBS was an individual successor was not properly before the Board. Id. at 1003–1004.

Thereafter, the General Counsel and the Union filed separate motions for reconsideration of the Board's decision. As relevant here, the Union contended in its motion that the Board erred when it found that the General Counsel had not litigated the question of whether PBS individually was a successor to Clean-Right. In a two-member decision, Chairman Schaumber and Member Liebman denied the Union's motion on the ground that the Union had not raised any issues that the Board had not previously considered and rejected. *AM Property Holding Corp*., 352 NLRB at 281. They also noted, however, that the General Counsel had not joined in the Union's motion and did not argue that PBS should be deemed an individual successor to Clean-Right. Accordingly, they concluded that the General Counsel did not intend to litigate the case on this basis, and they rejected the Union's motion on the additional ground that the General Counsel alone frames the theory of an unfair labor practice case, and a charging party may not enlarge upon or change the General Counsel's theory. Id. at 281 fn. 8 (citing *Tradesmen International*, 351 NLRB 359 fn. 2 (2007); *Kimtruss Corp.*, 305 NLRB 710, 711 (1991)). The two-member decision was subsequently affirmed and incorporated by reference in a decision by a properly constituted Board. See *AM Property Holding Corp.*, 355 NLRB at 721.

The Union petitioned for review in the Court of Appeals for the Second Circuit, challenging, among other things, the Board's finding that it was precluded from determining whether PBS was individually a successor to Clean-Right.[7] The Court found merit in the Union's argument on the ground that the Board had misinterpreted *Pergament United Sales*, supra, and related cases by erroneously assuming that it was necessarily precluded from considering the individual successorship issue because the General Counsel had not alleged or advanced

[5] The allegation that the unit employees' terms and conditions of employment were unilaterally changed in violation of Sec. 8(a)(5) when PBS set its initial employment terms depends on the theory the Board adopted in *Love's Barbeque*, supra. As explained above, I disagree with this aspect of *Love's Barbeque*. See supra fn. 3.

[6] Member Liebman authored a separate opinion in which she criticized then-existing Board precedent regarding joint-employer status, but she agreed that "under current law, whatever its flaws, . . . none of the respondents were successors to the unionized company (Clean-Right)." Id. at 1011 (Member Liebman, concurring in part and dissenting in part).

[7] The Court rejected the Union's additional arguments that PBS and AM were joint employers and joint successors and that the Board should have ordered certain extraordinary remedies. These matters are no longer at issue. In addition, the Respondents did not petition for review of the Board's violation findings, and the Board did not file a cross-application for enforcement.

that theory. *Service Employees International Union, Local 32BJ*, 647 F.3d at 447–448. The Court explained that, under *Pergament* and related cases, the Board "*may* identify a violation of the Act that was not specifically alleged in the complaint or advanced by the General Counsel *if* the parties had sufficient notice to satisfy due process . . . ." Id. at 447 (emphasis in original). Thus, the Court held that the Board should have determined whether the theory of PBS's individual successorship was closely connected to the complaint and had been fully litigated. Id. The Court also faulted the Board for relying on the General Counsel's failure to allege or establish the appropriateness of the separate AM and PBS units instead of either applying the principle that a bargaining unit limited to a single location is rebuttably presumed to be appropriate or explaining why that presumption was not applicable here. Id. at 448–449.

Based on this analysis, the Court vacated portions of the Board's decision "insofar as the agency found it was precluded from considering whether PBS was individually a successor employer to Clean-Right," and the Court remanded for reconsideration of this issue with the following instructions:

> We remand so that the Board can consider in the first instance whether PBS was an individual successor to Clean-Right and whether—based on the particular facts in this case—reaching this issue would comport with due process. In so doing, the Board should apply its single-facility presumption or articulate why this presumption is inapplicable. And if the Board finds that due process concerns do preclude it from reaching this issue, it should determine whether remand is appropriate under *Enloe*, 346 NLRB at 855–56 (remanding to the ALJ to provide the Respondent with an opportunity to litigate a potential violation of the Act so as to remedy any prejudice the Respondent might have suffered by the Board identifying a violation on a theory not alleged in the complaint or advanced by the General Counsel). Id. at 449.

The Board accepted the Court's remand and, at our invitation, the parties submitted statements of position regarding the issues presented by the remand. In its statement of position, PBS argues that because the General Counsel never advanced an individual successorship theory and the judge otherwise did not explore it, there is "virtually nothing" in the record to support a determination that PBS is individually a successor to Clean-Right. Among other things, PBS argues that the existing record does not establish "substantial continuity" between its operations and Clean-Right's. In addition, PBS asserts that a single-location presumption is "wholly inappropriate as applied to PBS and 80 Maiden Lane" because of how PBS structures its business, and PBS contends that additional evidence is required to analyze, among other things, the functional integration of its operations. Finally, PBS argues that even if a single-location unit is appropriate, the Union never requested to bargain with PBS, and therefore PBS cannot be held liable for failing to bargain with the Union. PBS argues that a remand would allow it to fully litigate these matters.

The General Counsel and the Union contend that the issue of PBS's status as an individual successor to Clean-Right is closely connected to the complaint and was fully litigated in the unfair labor practice hearing. The General Counsel and the Union argue that the Board may make an individual successorship determination based on the same facts that were established in connection with the alleged joint successorship theory, and there is no need to reopen the record to receive additional evidence. According to the General Counsel and the Union, the existing record supports a finding that PBS was individually Clean-Right's successor and violated Section 8(a)(5) of the Act. The General Counsel contends in the alternative that if the Board determines that it does not comport with due process to address the individual successorship issue on the existing record, then the Board should remand the issue to the judge for further litigation.

Discussion

In accordance with the Court's instructions on remand, the threshold question we must answer is whether due process permits us to rule on the issue of PBS's status as an individual successor. If we find that it does not, then we must then consider whether to remand this issue to the judge.

It is settled that the "fundamental elements of procedural due process are notice and an opportunity to be heard." *Lamar Advertising of Hartford*, 343 NLRB 261, 264 (2000) (citing *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950)). "The primary function of notice is to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990). If an issue is closely connected to the subject matter of the complaint and has been fully litigated, the Board may find and remedy a violation of the Act even in the absence of a specific allegation in the complaint. *Pergament*, 296 NLRB at 334. The ultimate determination of whether a matter has been fully litigated rests in part on "whether the respondent would have altered the conduct of its case at the hearing, had the specific allegation been made." Id. at 335.

For several reasons, I believe that my colleagues deny

PBS due process of law by deciding the issue of its status as an individual successor to Clean-Right on the existing record. In my view, a remand is warranted to permit PBS to litigate this issue.

First, not once, but twice, the Board found that the General Counsel did not litigate this case on the theory that PBS individually was Clean-Right's legal successor. Indeed, the Board went even further. Noting that the General Counsel did not join the Union's motion for reconsideration, the Board concluded that the General Counsel had affirmatively decided *not* to litigate the case on a theory of individual successorship, and the Board deemed the Union's reconsideration motion an improper attempt to enlarge upon or change the General Counsel's theory of the case. *AM Property Holding Corp.*, 352 NLRB at 281 fn. 8. I recognize that the Board, having accepted the Court's remand, must apply the Court's decision as the law of the case, and therefore the Board must view whether PBS's status as an individual successor was fully litigated as an open question. But I do not see how my colleagues can reasonably answer that question in the affirmative when the General Counsel neither litigated a theory of individual successorship at the unfair labor practice hearing nor joined the Union's attempt to urge that theory on reconsideration.[8]

Second, the mere fact that the record may contain evidence relevant to determining whether PBS was individually Clean-Right's successor does not dispose of due process concerns. As the Board and the Courts have observed, "'the presence of evidence in the record to support a charge unstated in a complaint . . . does not mean the party against whom the charge is made had notice that the issue was being litigated.'" *Enloe Medical Center*, 346 NLRB at 855 (quoting *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983), cert. denied sub nom. *Ladies Garment Workers Local 222 v. NLRB*, 467 U.S. 1241 (1984)); see also *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987) ("[T]he simple presentation of evidence important to a . . . claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing . . . due process rights."). When the record was created at the unfair labor practice hearing, PBS was not on notice that the evidence being adduced might be used to support a claim that it was *individually* Clean-Right's successor and *individually* violated Section 8(a)(5) of the Act by failing to recognize and bargain with the Union. Now that PBS is on notice of this claim, due process requires that it be afforded an opportunity to introduce additional relevant evidence. This requires a remand.

Third, as the Second Circuit itself emphasized, PBS can only be found an individual successor to Clean-Right if, among other things, "the bargaining unit that the [U]nion seeks to represent remains appropriate under [PBS's] operations." *Service Employees International Union, Local 32BJ*, 647 F.3d at 448 (internal quotations omitted). The issue of whether the surviving unit of PBS employees at 80–90 Maiden Lane remained appropriate has not been fully litigated. The Court instructed the Board to apply its presumption that a single-location unit is appropriate. But this presumption is rebuttable, and PBS is entitled to an opportunity to rebut it. In this respect, two issues would benefit from the development of a record on remand.

Because AM displaced some union-represented Clean-Right employees when it directly hired its own elevator operator and day porters to work at 80-90 Maiden Lane, it could be argued that the surviving unit of PBS employees was materially different from the original Clean-Right unit and was no longer appropriate. Although a reduction in the *size* of a unit does not, by itself, mean that the unit is no longer appropriate—see, e.g., *The Bronx Health Plan*, 326 NLRB 810, 812 (1989), enfd. 203 F.3d 41 (D.C. Cir. 1999)—PBS is entitled to an opportunity to litigate whether the PBS unit remained appropriate in light of the removal of the elevator operator and day porter *positions* from the previous Clean-Right unit.

PBS argues that only a multi-location unit is appropriate, and it suggests that an appropriate unit would include employees at all its New York City–area buildings. PBS states that the record is not fully developed on this point but that what limited evidence has been introduced supports the appropriateness of a multilocation unit. It cites, as an example, evidence that more than 50 different PBS employees worked intermittently at 80-90 Maiden Lane, even though that building typically needs just 12 employees at any particular time. PBS further asserts that there was "zero labor relations autonomy" at 80–90 Maiden Lane and that there is "rapid and frequent interchange evidencing the commonality of work rules and centralized control exercised by PBS." It also argues that a record developed on remand would shed light on its centralized control of operations and show that PBS employees working at various locations interact with one another and transfer between and among PBS's various

[8] The Court vacated the Board's decisions insofar as the Board found it was *precluded* from considering an individual successorship theory because the General Counsel had not alleged or litigated such a theory. *Service Employees International Union, Local 32BJ*, 647 F.3d at 450. It is undisputed, however, that the General Counsel did not allege or litigate this theory, and the Court did not disturb the Board's finding in this regard.

New York City–area facilities. Regardless whether PBS would ultimately succeed in rebutting the presumption that a unit limited to its employees at 80–90 Maiden Lane was appropriate, it has raised legitimate questions regarding this issue that cannot be adequately answered on the existing record. Contrary to my colleagues, PBS is not resting on the bald assertion that other evidence is available. Rather, it has pointed to the need to develop facts relevant to a defense it did not know it had to present in the underlying unfair labor practice hearing. Thus, a remand is warranted.

My colleagues contend that PBS "was effectively required to make" its arguments with respect to the single-facility presumption at the underlying hearing because the joint successorship theory advanced by the General Counsel overlapped with an unalleged individual successorship theory. Thus, my colleagues say that PBS "should" have presented all its evidence regarding unit appropriateness at the hearing. And they claim that PBS "effectively waived the [appropriate unit] issue at trial" when its counsel was asked by the judge at the outset of the hearing whether PBS was contending for a two-building unit and replied that "we don't really think it makes a difference—single or double." However, my colleagues' reasoning ignores an elemental reality: given that the General Counsel's theory of the case was that PBS and AM were *joint* employers and therefore joint successors with a joint obligation to recognize and bargain with the Union, PBS could have reasonably chosen a litigation strategy aimed at defeating the General Counsel's case on the threshold joint-employer issue. Such a strategy would have been focused on demonstrating that PBS and AM did not "share or codetermine those matters governing the essential terms and conditions of employment" of PBS's employees, *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982), and it would have ignored issues of unit appropriateness as irrelevant to joint-employer status. This would also explain counsel's remark: if PBS's litigation strategy was aimed at defeating the General Counsel's joint-employer theory, it *would* not have made any difference whether the smallest appropriate unit was a single-building or multibuilding unit. These considerations illustrate why the mere fact that a hearing record contains evidence relevant to a particular issue does not satisfy due process if the respondent was not on notice that the particular issue *was at issue*. See *Enloe Medical Center*, 346 NLRB at 855; *Conair Corp. v. NLRB*, 721 F.2d at 1372.[9]

In sum, I respectfully dissent from my colleagues' decision. Contrary to my colleagues, I believe the Board must remand the issue of PBS's status as an individual successor to Clean-Right to the administrative law judge. If the judge were to determine that this issue was closely connected to the complaint, PBS would then have a right to fully litigate it.

Dated, Washington, D.C. December 15, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED AND MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[9] PBS also argues that a remand is warranted to show that it was not obligated to bargain with the Union because the Union did not demand bargaining. My colleagues say that a demand was not required in these circumstances because PBS unlawfully refused to hire the former Clean-Right employees. It is well established, however, that a successor employer's obligation to recognize and bargain with the union commences only if and when several conditions are met: there must be substantial continuity in the business, the successor must be engaged in normal operations with a substantial and representative complement of employees, a majority of the successor's employees must have been previously employed as union-represented employees of the predecessor employer, *and* the union must have presented a demand for recognition or bargaining. *St. Elizabeth Manor*, 329 NLRB 341, 344 fn. 8 (1999); *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989); see generally *Burns*, 406 U.S. at 272; *Fall River Dyeing*, 482 U.S. at 27. I respectfully disagree with my colleagues that the Board may disregard the latter requirement (a union demand for bargaining) whenever an alleged successor engaged in antiunion hiring discrimination. It is well established that the union's demand for bargaining establishes the "moment" in time when the Board evaluates whether the other prerequisites to successor status have been satisfied. See *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 12-13 (2016) (Member Miscimarra, dissenting in part) (the fact that a new employer might otherwise be a "perfectly clear" successor does not permit the Board to disregard the union's failure to present a demand to the successor for recognition or bargaining), enfd. 872 F.3d 274 (5th Cir. 2017). Accordingly, I believe the Board must also permit PBS to present evidence on this issue on remand.

PBS also argues that it should be allowed to present evidence on remand regarding substantial continuity of operations between PBS and Clean-Right. My colleagues find that the present record establishes substantial continuity of operations, but PBS disagrees. I believe that it would be difficult to untangle the issue of substantial continuity of operations from issues relating to unit appropriateness. Accordingly, I would permit PBS to litigate this issue on remand as well.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL make whole the employees who were members of the bargaining unit represented by Local 32BJ, Service Employees International Union, at 80-90 Maiden Lane, New York, for losses caused by our failure to apply the terms and conditions of employment that existed in that unit prior to our commencing operations at that location.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

AM PROPERTY HOLDING CORP.

The Board's decision can be found at www.nlrb.gov/case/02-CA-033146 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.